TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 263.

THE UNITED STATES, APPELLANT,

vs.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY.

No. 264.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED APRIL 20, 1906.

(20210 AND 20211)

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1 In the Court of Claims.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE Building Company, claimant, v. THE UNITED STATES. } No. 20858.

I.—*Original petition.*

[Filed August 10, 1897.]

To the honorable Chief Justice and Judges of the Court of Claims:

The petition of the William Cramp and Sons Ship and Engine Building Company respectfully represents:

I.

That it is a citizen of the United States and of the State of Pennsylvania, being a body corporate and politic duly incorporated under the laws of the State of Pennsylvania, and carries on the business of ship and engine building; that its yards, plant, and works are located in the city of Philadelphia, in the State of Pennsylvania.

2 II.

That on the 19th day of November, A. D. 1890, your petitioner, in conformity with the laws of the United States in that behalf, entered into a contract with the United States, through its Secretary of the Navy, for the construction of a seagoing coast-line battle ship, designated as No. 1 and subsequently named the "Indiana," according to the specifications attached to said contract, at and for the sum of $3,063,000, a copy of which contract is hereto annexed, marked "Exhibit W. C. & S. No. 1," and prayed to be read as part hereof.

III.

That according to the terms of said contract the said battle ship "Indiana" was to be completed and delivered to the United States within three years from the date of said contract, and certain onerous penalties were reserved to be imposed upon your petitioner in the event that the completion and delivery of the said vessel was delayed beyond that period through the fault or delay of your petitioner.

IV.

That by the terms of the said contract it was provided that the United States should furnish within the times and in the order necessary to carry on the work properly all the armor, armor bolts, and their accessories, to be used in the construction of the vessel (except that required for the construction of the protective deck), your petitioner being required to furnish the working drawings and templates necessary for the construction of the armor within ten months from the date of the contract.

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V.

That immediately upon the signing of said contract your petitioner proceeded to prepare the necessary working drawings and templates according to the design of said vessel and promptly furnished them to the Navy Department, but the Department decided to use nickel steel in the construction of the armor, which it was found could not be bent to the contemplated curves, and the said plans and templates were thereby rendered useless, and new sets of both had to be prepared; yet, notwithstanding, your petitioner supplied the second set within the time required by the said contract.

VI.

That your petitioner also commenced work on the said vessel and organized a corps of competent and skilled mechanics and proceeded vigorously with the work, so that the vessel had, on or about the 4th day of November, 1891, reached a stage of progress at which the delivery of the diagonal armor plates became imperatively necessary; yet, notwithstanding the United States was kept constantly advised and urged to furnish the same, none were furnished until about June 6, 1892, and their delivery was not completed until January 3, 1893; that the delivery of other armor was unreasonably delayed, that for the armor belt being begun in August, 1894, more than a year after it was needed, and finished February 27, 1895; more than a year was consumed in harveyizing the plates aftey they had been furnished according to the original plan, growing out of the decision of the Department to substitute the harveyized plates for the original plates; that other necessary material was

4 not furnished until October 30, 1895, which delayed the completion of the vessel until November 19, 1895, causing a delay of two years, occasioned by the failure of the United States to perform the stipulations of the said contract on its part to be performed.

VII.

That by reason of the said several delays and defaults on the part of the United States your petitioner was put to great extra cost and expense and subjected to great loss and damage by being stopped and interrupted in its work and making it necessary for it to provide special arrangements in shops for tools and appliances, preparing an extra dock and keeping the same in repair for two years; for the care and maintenance of said vessel, including coal, wages, covers, extra painting, tug hire, and other like expenditures during said period.

VIII.

That the said vessel was completed to such a stage by the 14th of April, 1894, that your petitioner advised the Department that it would be ready on May 1, 1894, for its trial trip, but the Secretary of the Navy declined to permit such trip to be made at that time, but delayed its official trip for a period of twenty-one months after said date, but a special trial trip was made at an extra cost of $17,514.94.

IX.

That by reason of the unreasonable delay in making said official trial trip the bottom of the vessel became foul from lying at the dock for said period of twenty-one months, which fact greatly impaired her speed, so that, notwithstanding the extra cost your petitioner had incurred to increase the speed of the vessel over contract requirements in order to receive the speed premiums provided in said contract, the vessel only reached a speed premium of fifty thousand dollars ($50,000), although almost showing a speed equal to a premium of one hundred thousand dollars ($100,000), which last-mentioned premium would have accrued but for the foul bottom that existed because of the delays hereinbefore set forth.

X.

That by reason of said delays your petitioner, as required by the eighth paragraph of the contract, was compelled during all the additional period of time to keep the vessel insured against loss by fire and pay additional premiums therefor, and to borrow money to carry on the work and pay interest therefor by reason of being deprived of the payments that would have otherwise accrued to it, and which would have rendered the payment of said interest by it unnecessary.

XI.

That on or about the 1st of May, 1894, when your petitioner had applied for an official trial trip for said vessel, and when there had been earned by your petitioner and there was then justly due to your petitioner a very large sum of money, for the want of which your petitioner had been compelled to borrow money at abnormal rates of interest, and when large losses and damages had accrued to your petitioner by reason of some of the delays hereinbefore set forth, the Secretary of the Navy, while admitting and confessing that the delays in the completion of the vessel had been brought about by the default of the United States, and that losses and damages had accrued to your petitioner by reason thereof, unconscionably, unreasonably, and unlawfully, and taking advantage of the financial necessities of your petitioner, and, to coerce your petitioner into a relinquishment of its claim for damages that had then accrued to it by reason of the delays and defaults of the United States, refused to permit a trial trip for said vessel and refused to pay to your petitioner any of the sums of money then earned and due to it unless your petitioner would agree to release its claim upon the United States on account of said losses and damages.

XII.

That thereupon, and under the said unlawful coercion and dures imposed by the said Secretary of the Navy upon your petitioner, your petitioner did sign and deliver to the said Secretary of the Navy an agreement of said character, a copy of which is hereto annexed and marked "Exhibit W. C. & S., No. 2," and prayed to be read as part hereof.

XIII.

But your petitioner avers that no consideration for said release was given by the said United States, and no money was paid to your petitioner other than moneys that had been earned by your petitioner and which were arbitrarily and unlawfully being withheld, and your petitioner avers that said pretended release, having been secured by coercion and duress and without consideration, is utterly null and void and of no effect or legal force, and your petitioner prays that under the equity powers of the court the same may be annulled, cancelled, and set aside.

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XIV.

Your petitioner further says that it fully complied with and completed its said contract and did all the work and extra and additional work required and ordered, to the satisfaction of the United States, and the said vessel was delivered and accepted by the United States on or about the 18th day of November, 1895, and that but for the delays heretofore set forth the same would have been completed and delivered on or before the 18th day of November, 1893.

XV.

That by reason of said delays as aforesaid you petitioner has suffered the losses and damages as follows, to wit:

For time of organization and plant lost in waiting for armor, materials, etc., to be furnished by United States	$144,379.50
For special wharfage, 730 days, at 1 cent per ton per day	74,825.00
For general care and maintenance of vessel, including coal, firemen, engineers, watchman, canvas awnings, wooden covers, keeping clean, removing snow, dust, etc., extra painting, tug hire, moving derrick, etc., 730 days, at $135 per day	98,550.00
Additional cost of insurance	34,462.55
Interest on money borrowed caused by delays of United States which prolonged final settlement	60,499.91
Extra trial trip made necessary by construction and completion of vessel being delayed by United States	17,514.94
Carried forward	430,231.90
8 Brought forward	430,231.90
For loss due to running the official trial of "Indiana" with a foul bottom, as owing to the delay caused in the completion of the vessel it was impossible to clean and paint the bottom	50,000.00
Total	480,231.90

The premises considered, your petitioner prays judgment against the United States in this behalf for the sum of four hundred and eighty thousand two hundred and thirty-one dollars and ninety cents ($480,231.90) and the costs of this suit.

THE WILLIAM CRAMP AND SONS SHIP AND
ENGINE BUILDING COMPANY,
By CHAS. H. CRAMP, *President.*
JNO. C. FAY,
Attorney for Claimant.

JOS. K. MCCAMMON,
EPPA HUNTON,
C. F. [illegible]

STATE OF PENNSYLVANIA,
County of Philadelphia:

Chas. H. Cramp, being duly affirmed, says that he is the president of The William Cramp and Sons Ship and Engine Building Company, a corporation of the State of Pennsylvania, the claimant in the foregoing petition; that he has heard read the foregoing petition and knows the contents thereof and that the matters and things therein stated
9 are true to the best of his knowledge and belief and that no assignment of the said claim has been made.

CHAS. H. CRAMP.

Subscribed and sworn to before me this ninth day of August, A. D. 1897.

[SEAL.] ISAAC ARROTT,
Notary Public.

10 EXHIBIT W. C. & S. No. 1.

Contract for the construction of a seagoing coast-line battle ship of about 10,000 tons displacement.

"COAST-LINE BATTLE SHIP NO. 1."

Contract, of two parts, made and concluded this 19th day of November, A. D. 1890, by and between The William Cramp and Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the President of said corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part.

Whereas the act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," approved June 30th, 1890, authorized the construction of three seagoing coast-line battle ships, to be constructed in accordance with certain provisions contained in the act entitled "An act to increase the naval establishment," approved August 3d, 1886, and to be, in all their parts, of domestic manufacture;

And whereas, after due advertisement, the proposal of the said party of the first part for the construction of the hull and machinery of two of said vessels, including fittings and equipment, and the fitting, fixing, placing, and securing of all their armor, one of which vessels is, for the purposes of this contract, designated and known as "Coast-line Battle Ship No. 1," has been duly accepted by the Secretary of the Navy;

11 And whereas the drawings, plans, and specifications required by the said acts have been duly provided, adopted, and approved, in accordance with the provisions of said Act of June 30th, 1890.

Now, therefore, this contract witnesseth that, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided for, the party of the first part, for itself and its suc-

cessors and assigns and its legal representatives, does hereby covenant and agree to and with the United States, as follows—that is to say:

First. The party of the first part will, at its own risk and expense, construct, in accordance with the provisions of the acts of Congress relating thereto, and in conformity with the aforesaid drawings, plans, and specifications, one seagoing coast-line battle ship of about ten thousand ton's displacement, with fittings and equipment as specified, of the following principal dimensions:

	Feet.	Inches.
Length on load line	344	00
Extreme breadth	69	00
Depth in hold from top of main-deck beams to inner bottom	33	00

Such vessel to be constructed of steel, of domestic manufacture, and to be provided and fitted with machinery, engines, and boilers, also of domestic manufacture, complete in all their parts, appurtenances, and spare parts, and in all respects as described in the annexed drawings, plans, and specifications, and in the aforesaid acts of Congress, and will deliver the same at the navy-yard, League Island, Pennsylvania, to such person as the Secretary of the Navy may designate; it being, however, expressly understood and agreed, that if any article or thing included in, or covered by, the drawings, plans, and specifications aforesaid shall be found,
12 during the prosecution of the work under this contract, to be not produced or manufactured in the United States, and if, after reasonable effort, it shall be found impracticable to obtain the same as an article of domestic manufacture, then and in such case provision shall be made, by or with the approval of the Secretary of the Navy, for such alteration in the drawings, plans, and specifications, or for the adoption of such new or different device or plan as may be found necessary in order to carry out and complete this contract, subject, as to increased or diminished compensation by reason of such change, to the conditions applicable to changes as expressed in the second clause of this contract.

Second. The construction of the hull and machinery and the fittings and equipment of the vessel herein contracted for shall conform in all respects to and with the drawings, plans, and specifications above referred to, which drawings, plans, and specifications are hereto annexed and shall be deemed and taken as forming part of this contract with the like operation and effect as if the same were incorporated herein. No omission in the drawings, plans, or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the object and intent of the acts of Congress above referred to, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the party of the first part, and all claims for extra compensation by reason of, or for, or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the drawings, plans, and specifications aforesaid shall not be changed in any respect, when
13 the cost of such change shall, in the execution of the work, exceed five hundred dollars, except upon the written order of the Secretary or Acting Secretary of the Navy; that, if changes are thus made, the actual cost thereof, and the damage, if any, caused thereby shall be ascertained, estimated, and determined by a board of naval officers,

appointed by the Secretary of the Navy; that the party of the first part shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation which the said party of the first part shall be entitled to receive, if any, in consequence of such change or changes, and that if all the changes authorized increase the cost of constructing the vessel, and premiums are earned under this contract by the party of the first part, such of said increased cost, as results from changes tending to increase the speed of the vessel, shall be deducted from such premiums in the final settlement under this contract.

Third. The party of the first part will, within ten months from the date of this contract, furnish all working drawings and templates necessary to show the dimensions and shape of each and every armor-plate required for use in the construction of the vessel herein contracted for, including those to be used in the construction of the belt, turrets, redoubts, barbettes, conning-tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions, and the position and sizes of the bolt-holes therein—the spacing and dimensions of said bolt-holes to be in accordance with the specifications and subject to the approval of the Secretary of the Navy; it being expressly understood and agreed that the party of the first part shall furnish all the armor, armor bolts, and their accessories, and all the labor and material required in the
14 construction of the protective deck; that the party of the second part shall furnish all other armor, armor bolts, and their accessories, to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts, barbettes, conning-tower, gun-shields, ammunition tubes, and in the protection of the guns and loading positions, trim such armor plates to the drawing or template sizes and shapes within reasonable manufacturing limits, as set forth in the specifications, and drill and tap all necessary holes therein, as shown by said approved drawings and templates, and deliver said armor, armor-bolts, and their accessories, at such reasonable place or places in the shipyard of the party of the first part, as may be designated by the party of the first part, and within the times and in the order required to carry on the work properly; and that the party of the first part shall, at its own risk and expense, properly fit, fix, place, and secure all the armor to the vessel, including the belt, turrets, redoubts, barbettes, conning-tower, gun-shields, ammunition tubes, and protection of the guns and loading positions, and furnish all other materials and labor required in the construction of said vessel and her machinery, fittings, and equipment, as called for by the aforesaid drawings, plans and specifications; provided, however, and it is expressly understood, covenanted, and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery, engines, boilers and appurtenances, and equipment and all other work required under this contract, except the fitting, fixing, placing and securing of the armor for her side-belt, casemate, turrets, redoubts, barbettes, and conning-tower, the party of the second part shall not have commenced the delivery of such armor to the party of the first part, then
and in such case the vessel shall be subjected to the trial provided
15 for in the tenth clause of this contract, and if, at and upon such trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor for the side-

belt, casemate, turrets, redoubts, barbettes, and conning-tower, shall be fulfilled the vessel shall be accepted as provided for in the eleventh clause of this contract; and if the party of the second part shall not have commenced the delivery of the armor for the side-belt, casemate, turrets, redoubts, barbettes, or conning-tower when the vessel is ready for her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, said vessel shall be finally accepted, and the cost of fitting, fixing, placing, and securing the armor for the side-belt, casemate, turrets, redoubts, barbettes, and conning-tower shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, the party of the first part shall be bound by the determination of said board, and such cost shall be deducted from the contract price of the vessel in the final settlement under this contract; but if the party of the second part shall commence and continue with reasonable diligence the delivery of the armor for the side-belt, casemates, turrets, redoubts, barbettes, or conning-tower of said vessel prior to her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, the party of the first part shall fit, fix, place, and secure all the armor to the vessel in accordance with the requirements of this contract and the drawings, plans, and specifications hereto annexed.

Fourth. The materials and workmanship used and applied in the construction of the hull, machinery, fittings, and equipment of the vessel herein contracted for, and in the fitting, fixing, placing, and securing of her armor, in details and finish, shall be first class and of the very
16 best quality, and shall, from the beginning to the end of the work, be subject to the inspection of the Secretary of the Navy; it being hereby expressly understood, covenanted, and agreed that the said Secretary may appoint suitable inspectors, to whom the party of the first part shall furnish such samples, and such information as to the quality thereof and the manner of using the same, as may be required, and also any assistance such inspectors may require in determining the weight and quality of steel and other metals, and of wood and other materials, either used or intended for use in the construction of said vessel, her machinery, fittings, or equipment, or in the fitting, fixing, placing, and securing of her armor, and that the inspectors may, with the approval of the said Secretary, peremptorily reject any unfit material or forbid the use thereof. The inspectors shall, at all times during the progress of the work, have full access thereto, and the party of the first part shall furnish them with full facilities for the inspection and superintendence of the same.

Fifth. The steel to be used in the construction of the hull (including the protective deck), machinery, and appurtenances of the vessel herein contracted for, except that used in the construction of her armor, shall conform to the "Specifications for inspection of steel for use in the construction of the hulls and machinery of coast-line battle ships Nos. 1, 2, and 3, and cruiser (protected) No. 12, for the United States Navy," approved by the Secretary of the Navy under date of September 1st, 1890, which specifications are annexed to and form a part of this contract.

Sixth. The party of the first part will, at its own expense, prepare such plans or drawings as may be necessary during the progress of the work,

and will submit the same to the Navy Department for approval before the material is ordered or the work commenced.

17 Seventh. The party of the first part, in consideration of the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for, or on account of, the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented invention, article, or appliance which has been or may be adopted or used in or about the construction of the hull, machinery, fittings, or equipment of said vessel, or any part thereof, or in fitting, fixing, placing, and securing her armor, under this contract, and to protect and discharge the Government from all liability on account thereof, or on account of the use thereof, by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy.

Eighth. The hull, machinery, fittings, and equipment of the vessel herein contracted for, and all materials and appliances provided for and used, or to be used, in the construction thereof, shall be kept duly insured, which insurance shall be renewed and increased, from time to time, by and at the expense of the party of the first part, the loss, if any, to be stated in the policies, as payable to the United States; the insurance to be effected in such manner and in such companies as shall be approved by the Secretary of the Navy, and in an amount to be fixed, from time to time, by him, not exceeding the amount of advance payments made under this contract.

Ninth. The vessel herein contracted for, including her hull, machinery, fittings, and equipment, with all her armor fitted, fixed, placed, and secured, as aforesaid, shall be completed and ready for delivery to the United States on or before the expiration of three years from the date of this contract; but the lien of the United States upon said

18 hull, machinery, fittings, and equipment, and the materials on hand for use in the construction of the vessel, respectively and collectively, for all moneys advanced on account thereof, shall commence with the first payment, and shall thereupon attach to the work done and materials furnished, and shall, in like manner, attach from time to time, as the work progresses, and as further payments are made, and shall continue until it shall have been properly discharged. In case the completion of the vessel, her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of all her armor, as aforesaid, shall be delayed beyond the said period of three years, deductions shall be made from the contract price of the vessel for each and every day (excepting Sundays) during the continuance of such delay, and until the vessel, including her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of all her armor, shall be completed and ready for delivery to the United States, as follows, viz: During the three months next succeeding the expiration of said period, seventy-five dollars ($75) per day; during the fortieth, forty-first, and forty-second months from the date of this contract, one hundred and fifty dollars ($150) per day; and for each and every day (excepting Sundays) during which such completion shall be delayed beyond the period of three years and six months from the date of this contract, two hundred dollars ($200) per day—all such deductions from the contract price of the vessel to be

made, from time to time, from any payment or payments falling due under this contract; provided, however, that such delay shall not have been caused by the act of the party of the second part, or by fire or water, or by any strike or stand-out of workmen employed in the construction of the hull, machinery, fittings, or equipment, of said vessel, or in the fitting, fixing, placing, and securing of her armor, or by other circum-
19 stances beyond the control of the party of the first part; but such circumstances shall not be deemed to include delays in obtaining materials when such delays arise from causes other than those herein specified; provided, further, that in case of any such alleged delay, the party of the first part shall give immediate notice thereof in writing to the Secretary of the Navy.

In case any question shall arise under this contract, concerning premiums over and above, or deductions from, the contract price of the vessel herein contracted for, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon the parties to this contract.

All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel; provided, however, that no delay attributed by the party of the first part to the Navy Department, its officers or agents, or the alleged cause or causes thereof, shall be considered by the Secretary of the Navy unless the party of the first part shall, at the time of the occurrence of such delay, notify him in writing of the facts and cirumstances in each case, and of the extent to which the said party of the first part claims that the final completion of the vessel is thereby delayed.

Tenth. The party of the first part hereby further covenants and agrees that the vessel to be constructed under this contract shall be suf-
20 ficiently strong to carry her armor, and the armament, equipment, coal, stores, and machinery prescribed by the Secretary of the Navy and indicated in the annexed drawings, plans, and specifications; that the total weight of said machinery, including engines, boilers, and appurtenances; all fixtures in engine and fire rooms; smoke pipes; distilling apparatus; and water in boilers, condensers, pumps, pipes and stern tubes—but not including turret machinery, stores, heating apparatus, spare parts, tools in workshop, capstan, windlass, steering gear or winches—shall not exceed eight hundred and seventy-five (875) tons, this weight to be determined from the certified records of the actual weight of the parts of the machinery as they are sent on board the vessel to be connected up, except the weight of the contained water, which shall be calculated from the actual volumes in steaming condition, as shown on the certified drawings of the completed machinery, the weight to be calculated for salt water, except for those parts where fresh water only is used; that if said total weight (875 tons) be exceeded, a deduction of five hundred dollars ($500) per ton shall be made from the contract price of the vessel for each ton of excess weight over that stipulated (875 tons), and

that if said weight (875 tons) be exceeded by five per cent, a further deduction of ten thousand dollars ($10,000) shall be made from the contract price of the vessel—all such deductions to be made from any payment or payments falling due under this contract; and that when the vessel is completed and ready for delivery to the United States, as required by the drawings, plans and specifications, she shall be subjected to a trial trip, in the open sea, under conditions prescribed or approved by the Secretary of the Navy, to test the hull and fittings, the machinery, including engines, boilers, and appurtenances, the equipment, and the
21 speed of the vessel, and that such vessel shall be accepted only on fulfillment of, and subject to, the conditions and agreements hereinafter set forth:

(1) That the working of the machinery in all its parts shall be to the satisfaction of the Secretary of the Navy.

(2) The party of the first part hereby guarantees that the speed developed by said vessel upon said trial, under conditions prescribed or approved by the Secretary of the Navy, shall be not less than an average of fifteen (15) knots per hour, maintained successfully for four (4) consecutive hours, during which period the air pressure in the fire-room shall not exceed one inch of water—the vessel to be weighted to a mean draught of twenty-four (24) feet, it being mutually understood, covenanted and agreed that for every quarter knot of speed so exhibited and maintained above said guarantee (15 knots) the party of the first part shall receive a premium, over and above the contract price of the vessel, of twenty-five thousand dollars ($25,000), and that for every quarter knot that said vessel fails of reaching said guaranteed speed (15 knots), there shall be deducted from the contract price the sum of twenty-five thousand dollars ($25,000).

(3) That said vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment, and the fitting, fixing, placing, and securing of her armor, and all other work required under this contract, shall be found to be strong and well built, and well performed, and in strict conformity with the contract, drawings, plans, and specifications, and shall be approved by the Secretary of the Navy; provided that if, at and upon said trial, there shall be any failure in the vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment, and the fitting, fixing, placing, and securing of her armor, to meet fully the requirements of this contract, the party
22 of the first part shall be entitled to make further trials, sufficient in number to reasonably demonstrate the capabilities of the vessel; and provided also that the number of trials shall be determined and limited by the Secretary of the Navy, and that the expenses of a successful trial shall be paid by the party of the second part, but that any unsuccessful trial of the vessel or her machinery, prior to her "preliminary" or "conditional" acceptance, shall be at the expense of the party of the first part.

Eleventh. If, at and upon the trial trip before mentioned, the foregoing requirements and conditions relating to the hull, fittings, and machinery, and equipment, of said vessel, and to the fitting, fixing, placing, and securing of her armor shall be fulfilled, and if the speed (15 knots) guaranteed as aforesaid shall be developed and maintained as aforesaid, then and in such case the vessel shall be preliminarily accepted, and pay-

ment of the last three instalments of the contract price of the vessel, and of all reservations, shall be made, subject, however, to a special reserve of sixty thousand dollars ($60,000) from and out of the reservations hereinafter provided for; but if the speed developed and maintained by said vessel, during such trial, shall fall below the speed (15 knots) guaranteed as aforesaid, she shall be conditionally accepted, subject to deductions, as aforesaid, from the contract price of the vessel on account of her failure to reach the speed (15 knots) guaranteed as aforesaid; provided, however, that all the other requirements and conditions of this contract, relating to the hull, fittings, and machinery, and equipment, of said vessel, and to the fitting, fixing, placing, and securing of her armor, shall have been fulfilled; and that, in case of such conditional acceptance, the twenty-eighth, twenty-ninth, and thirtieth instalments of the contract
23 price of the vessel, and the reservations on payments under this contract, shall constitute a reserve fund which shall be applicable to or towards the satisfaction of such deductions from the contract price, and shall be retained by the party of the second part for that purpose.

In case of a "preliminary" acceptance of said vessel the said "special reserve" of sixty thousand dollars ($60,000), or in case of a "conditional" acceptance of said vessel the said "reserve fund," or so much thereof as may, in the judgment of the Secretary of the Navy, be necessary, shall be held until the vessel has been finally tried, after being fully equipped, armed (or weighted correspondingly), and in all respects complete and ready for sea, under conditions prescribed or approved by the Secretary of the Navy; provided that such final trial shall take place within five months from and after the date of the "preliminary" or the "conditional" acceptance of the vessel.

If, at and upon such final trial, or at any time within five months after either a "preliminary" or a "conditional" acceptance of said vessel, such final trial not having taken place, any weakness or defect in the hull, fittings, or equipment, due to either defective workmanship or defective materials, or in the fitting, fixing, placing, and securing of the armor, due to defective workmanship, shall appear, the same shall be corrected and repaired to the satisfaction of the Secretary of the Navy, and at the expense of the party of the first part; or if at any time during said period the machinery, or any part or parts thereof, shall be found to be defective in construction with respect to either workmanship or materials, or if there shall be any failure, breaking down, or deterioration, other than that due to fair wear and tear, of any part or parts of the machinery, engines, boilers, or appurtenances, the same shall be corrected and repaired, to the satisfaction of the Secretary of the
24 Navy, at the expense of the party of the first part; and the party of the first part may, if it so desires, have an engineer of its own selection present in the engine room of said vessel at any time or times during said period, who shall have full opportunity to observe and inspect the working of the machinery in all its parts, but without any directing or controlling power over the same, and in case such engineer shall be a civilian his compensation shall be paid by the party of the first part.

If the vessel be not in readiness for such final trial within five months from the date of her "preliminary" or "conditional" acceptance through no fault or delay on the part of the party of the first part, and no weakness or defects in the hull, fittings, or equipment, or in the machinery,

including engines, boilers, and appurtenances, due to either defective workmanship or defective materials, or in the fitting, fixing, placing, and securing of the armor, due to defective workmanship, shall have appeared, then the vessel shall be finally accepted, and the said "special reserve," or the surplus, if any, of the said "reserve fund," paid, subject, however, to deduction on account of any reductions that may be made in the contract price of the vessel under the provisions of this contract.

Twelfth. The Department having provided, as foundation for this contract, drawings, plans, and specifications of a vessel which it has reason to think would, if properly carried out, result in the production of a speed of not less than fifteen (15) knots per hour, assumes no responsibility with reference thereto, and will consider any changes suggested by the party of the first part, either as to hull or machinery, and, as the responsibility is with the party of the first part, will feel it to be its duty to deal liberally with any proposed changes, so long as the size, strength, and character of the vessel shall remain substantially
25 the same, changes in plans or specifications involving increased or decreased expense to be dealt with as provided for in the second clause of this contract.

Thirteenth. It is further mutually understood, covenanted, and agreed that, in case of the failure or omission of the party of the first part, at any stage of the work prior to final completion, from any cause or causes other than those specified in the ninth clause of this contract, to go forward with the work and make satisfactory progress towards its completion within the prescribed period, it shall be optional with the Secretary of the Navy to declare this contract forfeited. The party of the first part shall thereupon, and on notice thereof in writing, be, and the said party of the first part does hereby, in consideration of the premises, for itself and its successors and assigns, and its legal representatives, acknowledge itself to be justly indebted to the United States, as for liquidated and ascertained damages, in a sum equal to the aggregate amount of all advanced payments theretofore made to it for, or on account of, work done under this contract, and does further, as aforesaid, covenant and agree to refund the same on demand, or within sixty days thereafter, and that the United States shall and may hold, as collateral security for such refund, said vessel, machinery, materials, fittings, and equipments, or so much thereof as shall then have been constructed or furnished, or as shall be on hand for the purposes of construction. The Secretary of the Navy shall thereupon cause to be taken and filed a full and complete statement and inventory of all work done or commenced in, upon, or about the hull, machinery, fittings, and equipment of said vessel, and in the fitting, fixing, placing, and securing of her armor, and of all materials on hand applicable thereto, the property of the
26 party of the first part, and shall cause the same to be duly valued by a board, consisting of not less than five persons, qualified by knowledge and experience for the discharge of their duties, to be appointed by the Secretary of the Navy, which board shall proceed without unnecessary delay to examine such work and materials and ascertain and declare the fair market value thereof, including a reasonable and customary margin of profit upon so much of the work as shall have been, at the time such forfeiture is declared, satisfactorily performed; and upon such

examination the party of the first part may attend, and, if it so desires, by counsel, and submit such evidence as the board may deem proper.

Fourteenth. Upon receipt of the report and finding of said board, and upon his approval thereof, the Secretary of the Navy may, in his discretion, proceed to complete said vessel, including her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of her armor, and all other work required under this contract, in accordance with the contract, drawings, plans, and specifications, using for that purpose all suitable materials on hand and included in the inventory aforesaid; and the title to said vessel, machinery, fittings, and equipment, or so much thereof as shall have been completed, and to all such materials shall forthwith vest in the United States; and the party of the first part does hereby, for itself and its successors and assigns, and its legal representatives, covenant and agree to and with the United States that, on receiving notice of the intention of the Secretary of the Navy to proceed to the completion of the work, it will surrender said vessel, machinery, fittings, and equipment, and all materials on hand, together with the use of the yard or "plant," and all machinery, tools, and appliances appertaining thereto and theretofore used or necessarily to be used in and about the completion of the work.

27 Fifteenth. In case the Secretary of the Navy shall proceed, under the foregoing clause, to complete the work, such procedure shall be without unnecessary delay, and shall be at the risk and expense of the party of the first part, which party shall be chargeable with any increase in the cost of materials or labor incurred by reason of its failure to perform this contract. Upon the final settlement of the liability of the party of the first part, an account shall be stated substantially as follows:

The party of the first part shall be charged—

1. With all advance payments.

2. With the extra cost, if any, of materials and labor, and all other extra expenses, if any, over and above the contract price, incurred in the completion of the work.

The party of the first part shall then be credited with the value of the work done up to the time of suspension, and of the materials on hand, as ascertained by the board, under the provisions of the thirteenth clause of this contract, and approved by the Secretary of the Navy, and with such advance payments, if any, as may have been refunded. If a balance shall thereupon appear in favor of the party of the first part, the same shall be paid to and accepted by the said party of the first part in full discharge of all claims under this contract; but if a balance shall appear in favor of the United States, the party of the first part hereby covenants and agrees as aforesaid to pay and discharge the same on demand.

Sixteenth. It is mutually understood, covenanted, and agreed, by and between the respective parties hereto, that it shall not, under any circumstances, be obligatory upon the party of the second part to accept or pay for the vessel, or any part thereof, to be constructed under this contract, unless she shall have been completed in strict conformity with

28 this contract, and in accordance with the provisions of the acts of Congress relating thereto, and that this qualification shall be deemed and taken as applicable and applying to each and every clause, covenant, and condition, express or implied, in this contract contained.

Seventeenth. It is mutually understood, covenanted, and agreed, by and between the respective parties hereto, that this contract shall not, nor shall any interest therein, be transferred by the party of the first part to any other person or persons.

Eighteenth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no member of or delegate to Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; but this stipulation, so far as it relates to members of or delegates to Congress, shall not be construed to extend to this contract, it being made with an incorporated company.

Nineteenth. The United States, in consideration of the premises, do hereby contract, promise, and engage, to and with the party of the first part as follows:

1. The contract price to be paid for the vessel, machinery, fittings, and equipment, to be constructed and furnished in accordance with this contract, including the fitting, fixing, placing, and securing of her armor, shall be three million and twenty thousand dollars ($3,020,000), but if the length of the vessel be increased, the cost of such increase shall be added to such price.

2. Payments shall be made by the United States in thirty equal instalments, as the work progresses, with a reservation of ten per cent from each instalment.

29 3. No payment shall be made except upon bills, in triplicate, certified by the inspectors, in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof.

4. All warrants for payments under this contract shall be made payable to the party of the first part or its order.

5. The payment of the last three instalments shall not be made except as provided for in the eleventh clause hereof.

6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled within ten days after the filing and acceptance of its claim, to receive the said "special reserve," or the surplus, if any, of the said "reserve fund," or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract.

Twentieth. If any doubts or disputes arise as to the meaning of anything in the drawings, plans, or specifications, or if any discrepancy appear between said drawings, plans, or specifications and this contract, the matter shall be at once referred to the Secretary of the Navy for determination, and the party of the first part hereby binds itself and its successors and assigns, and its legal representatives, to abide by his decision in the premises. The interlineation of the words "and continue with reasonable diligence" in the thirty-seventh line of this contract was made before signing.

In witness whereof, the respective parties have hereunto set their hands and seals the day and year first above written.

30 Signed and sealed in the presence of—

THE WM. CRAMP & SONS SHIP & ENGINE BUILDING CO.,
By (signed) CHAS. H. CRAMP, [L. S.]
President.

Attest:
HENRY W. CRAMP, *Secretary.*

THE UNITED STATES, [L. S.]
By (s) B. F. TRACY,
As Secretary of the Navy.

(s) WM. B. REMEY,
Judge-Advocate-General,
As to B. F. Tracy, Secretary of the Navy.

31 EXHIBIT W. C. & S. No. 2.

Memorandum of agreement relative to change in contract for construction of "Indiana," dated May 10, 1894.

It is hereby agreed, by and between the William Cramp and Sons Ship and Engine Building Company, a corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, this tenth day of May, 1894, that the contract made on the 19th of November, 1890, between the parties hereto, for the construction of Coast-line Battle Ship No. 1, the "Indiana," be altered and amended as follows, viz:

So much of said contract as provides for the payment to the party of the first part of the last three installments of the contract price, and of the amount reserved from the previous payments, only after a trial trip and a preliminary or a conditional acceptance of the vessel by the United States, is hereby rescinded and in lieu thereof it is hereby agreed, as part of said contract, that the party of the second part shall pay to the party of the first part so much of the aggregate amount of the last three installments of the contract price and of the amount of the reservations from previous payments as will leave in the hands of the party of the second part an amount sufficient, in the judgment of the Secretary of the Navy, to cover the special reserve of sixty thousand dollars ($60,000) provided for in the eleventh clause of the contract, the cost of all unfinished work and all deductions likely to be made on account of deficiencies in speed and all contingencies that are liable to arise. But such payment shall not be made until the party of the first part has given bond with approved security conditioned for the return to the party of the second part
32 of the amount so paid, upon demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part against loss or injury by reason of such payment, and in consideration of such advance payment the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with its contract or on account of any delay hitherto occasioned by the action of said party of the second part.

It is further stipulated and agreed that the said contract, as hereby modified, shall remain in all other respects unchanged and unaffected in its legal effect by said modification.

In witness whereof the respective parties hereto have hereunto set their hands and seals the day and year first above written.

Signed and sealed in the presence of—

THE WM. CRAMP & SONS SHIP & ENGINE BUILDING COMPANY,
By CHAS. H. CRAMP, *President.*

Attest: HENRY W. CRAMP, *Secretary.*

THE UNITED STATES,
By W. McADOO,
As Acting Secretary of the Navy.

SAM'L C. LEMLY,
Judge-Advocate-General,
As to W. McAdoo, Acting Secretary of the Navy.

33 In the Court of Claims of the United States. Term A. D. 1905–1906.

II.—*Traverse—Filed March 21, 1905.*

THE WILLIAM CRAMP & SONS SHIP AND ENGINE Building Company
v.
THE UNITED STATES. } No. 20858.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

34 III.—*Argument and submission of case.*

This case was argued by Mr. Fay for the claimants and by Mr. Binney for the defendants on the 21st, 22nd, and 23rd days of November, 1905, and submitted.

35 IV.—*Findings of fact, conclusion of law, and opinion of the Court—Filed January 29, 1906.*

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE Building Company
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT:

I.

The claimant herein is a corporation incorporated under the laws of the State of Pennsylvania, and carries on the business of ship and engine building, with its yards and plant and works located in the city of Philadelphia, in said State.

II.

On November 19, 1890, the claimant entered into a contract with the United States, through their Secretary of the Navy, whereby, in consideration of the sum of $3,063,000, to be paid as provided in said contract, it agreed to construct and complete within three years from said date as in said contract provided, a seagoing, coast-line battle ship, designated as No. 1, and subsequently named the "Indiana," all in accordance with the specifications attached to and made a part of said contract, which contract, marked "Exhibit W. C. & S. No. 1," is annexed to and made a part of the petition herein.

III.

Immediately after the making of said contract the claimant arranged and systematized a working programme for the construction of said vessel by organizing its working force so as to cooperate with each other in harmony on coordinate work, and to secure economy in the construction of the vessel within the contract time and to escape the penalties imposed thereby for delays. The claimant would have completed the vessel within the contract period if it had not been for the failure of the United States to furnish materials within the time and in the order to properly carry on the work which by the terms of the contract they had agreed to furnish.

By reason of the failure of the defendants to furnish the materials, which by the third clause of the contract they had agreed to furnish, within the time and in the order as aforesaid, the completion of the vessel was delayed for two years beyond the contract period.

36 The armor to be furnished in accordance with said clause of the contract was obtained by the defendants from other contractors, who, without any fault on the part of the claimant, failed to complete the manufacture thereof in time for the defendants to deliver the same to the claimant as they had agreed to do.

The various kinds of armor, including the necessary bolts, nuts, etc., were delivered as follows:

Diagonal armor, beginning June 6, 1892, and ending July 3, 1892.

Casemate armor, beginning March 16, 1893, and ending May 1, 1893.

Conning tower tube, May 1, 1893.

Barbette armor, beginning July 10, 1893, and ending September 23, 1893.

Sponson armor, beginning December 2, 1893, and ending March 24, 1894.

Ammunition tubes, beginning April 24, 1894, and ending May 22, 1894.

Eight-inch turret, beginning September 22, 1894, and ending December 7, 1894.

Conning tower shield and covers, complete, October 5, 1894.
Side armor beginning August 13, 1894, and ending August 6, 1895.
Thirteen-inch turrets, beginning May 16, 1895, and ending September 5, 1895.

IV.

On December 4, 1895, and after the completion and delivery of the vessel at the time hereinafter stated, the Secretary of the Navy decided that the cause of delay for the period of two years in the completion of the vessel was due to the failure of the United States to furnish the claimant the materials contracted to be furnished by them within the time and in the order to properly carry on the work; and for that reason the time within which to complete the vessel, and thereby release the claimant from the penalties provided for in the 19th paragraph of the contract, was on said date extended by the Secretary of the Navy a corresponding length of time, to wit, to November 19, 1895, on which latter date the vessel so contracted for was completed and delivered.

V.

On May 10, 1894, before the Secretary of the Navy had finally decided the cause of delay, as aforesaid, and before there had been a preliminary or conditional acceptance of the vessel, owing to the failure of the defendants to furnish, in the order required, the material which they had agreed to furnish, the contract was modified, which modification is made a part of the petition herein and marked "Exhibit W. C. & S. No. 2," by the terms of which modification the defendants agreed to pay the claimant a portion of the reservations of installments, which under the original contract were not payable, as therein set forth, until after a preliminary or conditional acceptance of the vessel; and $234,830, being the amount of the reservations of the first 23 out of the 27 installments earned by the claimant, were paid on or about June 20, 1894. The claimant, as provided in the modification aforesaid, furnished security against any loss to the defendants on account of such payment, but no demand for any
37 refund was ever made upon it. In consideration of the payment aforesaid, the claimant, as recited in said modification, released the defendants "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the" defendants to comply with its contract, "or on account of any delay hitherto occasioned" by them.

To the modification of the contract and the release as aforesaid, the claimant at the time does not appear to have made objection or protest.

VI.

On May 18, 1896, after the completion and delivery of the vessel, in accordance with the sixth paragraph of the nineteenth clause of the contract, the balance of the money due thereunder, but withheld in accordance therewith until the final acceptance of the vessel, was paid to the claimant and the same was accepted and a release and receipt was executed therefor by it in the terms following:

Whereas by the eleventh clause of the contract dated November 19, 1890, by and between The William Cramp and Sons Ship and Engine

Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the president of said company, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a seagoing coast-line battle ship of about ten thousand tons displacement, which, for the purpose of said contract is designated and known as "Coast-line battle ship No. 1," it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be held until the vessel shall have been finally tried; provided that such final trial shall take place within five months from and after the date of the preliminary or the conditional acceptance of the vessel; and

Whereas by the sixth paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve or so much thereof as it may be entitled to on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy of all claims of any kind or description under or by virtue of said contract; and

Whereas the final trial of said vessel was completed on the eleventh day of April, 1896; and

Whereas all the conditions, covenants and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part;

Now, therefore, in consideration of the premises, the sum of forty-one thousand one hundred and thirty-two dollars and eighty-six cents ($41,132.86), the balance of the aforesaid special reserve ($60,000), to which the party of the first is entitled, being to me in hand paid by the United States, represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp,
38 president of said corporation, does hereby for itself and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid.

In witness whereof I have hereunto set my hand and affixed the seal of The William Cramp & Sons Ship and Engine Building Company this eighteenth day of May, A. D. 1896.

[SEAL.] CHAS. H. CRAMP, *President.*

Attest:

JOHN DOUGHERTY, *Secretary.*

to the giving of which release and receipt the claimant does not appear at the time to have objected or protested.

VII.

Before and during the period of delay, as aforesaid, the claimant's business was so large that in order to obtain more room for materials

for the vessels under construction at the claimant's yard, of which the "Indiana" was one, it purchased additional ground, at a cost of $121,756.03, and erected thereon temporary shops, in which to handle and rehandle material, at an additional cost of $3,000. It is not shown that the purchase of said real estate was necessary to the construction of the "Indiana," or that any portion of the outlay therefor was attributable to the vessel during the period of delay.

VIII.

After the expiration of the contract period and during the two years that the vessel was delayed in completion, as hereinbefore found, the reasonable value for the use of the claimant's yard, machinery, and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard chargeable to the "Indiana," was $3,000 per month, or $72,000 for the two years' delay.

The proportion of said expenses chargeable to the "Indiana" from May 10, 1894, the date of the release set forth in Finding V, being for one year six months and nine days, was $54,887.67.

IX.

For the proper care and protection of the vessel during the two years' delay, including expense of cleaning the bottom, furnishing material and painting, temporary awnings and tents over caps left for the introduction of turrets, additional scaling to remove rust before painting, electric lighting, keeping up steam to prevent freezing of valves, wetting down decks, going over machinery, and keeping vessel free from snow, dust, ice, and débris, the reasonable cost was $48,000.

The proportion of said expenses for the period from May 10, 1894, being for one year six months and nine days, was $36,591.78.

39

X.

The customary rate of wharfage of merchant vessels at the port of Philadelphia during the time the "Indiana" was being constructed was 1 cent per net registered ton, and upon that basis, if allowed, the wharfage on the "Indiana," with a net tonnage which we find was 3,203.58, during said two years' delay was $32 a day, or $23,360.

The proportion of expense during the period from May 10, 1894, being for one year six months and nine days, was $17,808, inclusive of the dredging of the basin or bed in which to accommodate the vessel.

The claimant also incurred an expense of $5,783 for tug service in removal of the vessel from time to time. Such expense is not shown to have been necessary to the construction of the vessel during the period of delay. It appears to have been for the benefit and convenience of the claimant.

XI.

During the two years' delay the claimant was required to and did keep the vessel insured for the benefit and protection of the United States,

and the reasonable cost thereof aggregated during said period the sum of $34,463.55.

The proportionate expense for the period from May 10, 1894, being one year six months and nine days, was $26,272.55.

XII.

March 23, 1894, the claimant notified the Secretary of the Navy that the vessel, other than the fitting of the armor, had reached a stage of completion ready for an official trial and proposed to offer said vessel therefor between May 1 and 10 following.

Seven other vessels built by the claimant for the United States had been permitted to go on trial trips before their completion. The "Indiana" was the first battle ship constructed, and before the armor was completed thereon the claimant proposed on official trial.

March 9, 1894, the Secretary of the Navy addressed to the claimant the following letter:

WASHINGTON, *March 9, 1894.*

GENTLEMEN: In view of the fact that the trial of the "Indiana" will take place at an early date, and as you are probably now making preparation therefor, your attention is invited to the tenth clause of the contract for the construction of that vessel, which provides that the expenses of a successful trial of the vessel shall be borne by the Government.

With a view to an expeditious settlement of the bill for the trial expenses of the vessel after the trial shall have taken place, the Department has to-day directed Chief Engineer J. W. Thomson and Naval Constructor J. F. Hanscom, United States Navy, to inform themselves as to what expenses you incur in preparing the vessel for trial, on the trial, and in furnishing the supplies of all kinds to be used, in order that they may be able to report to the Department after such examination, if any, as they may be required to make of your bill as to whether the items included therein are properly chargeable to the Government, and as to whether the prices charged therefor are proper and reasonable.

The Department requests that you will confer with the above-named officers in regard to the expenses necessary to be incurred in the trial of the "Indiana," and afford them such information as will enable them to fully comply with the Department's instructions, as above stated.

Very respectfully,

H. A. HERBERT,
Secretary of the Navy.

The WILLIAM CRAMP & SONS
SHIP AND ENGINE BUILDING COMPANY,
Philadelphia, Pa.

The expense so incurred was verified by such officers and no objection was found to the amount thereof. But in the meantime the Secretary of the Navy was in doubt as to whether the vessel was ready for such official trial, and to ascertain that fact did, on April 12, 1894, appoint a board, consisting of three naval officers, to inquire into the matter.

The board made such inquiry, and on April 18, 1894, reported to the Secretary that the hull of the vessel was about eighty-four one-hundredths completed, and that but one-half of the armor had been fitted in place. The board unanimously reported that the vessel was not then and would not be by May 1, 1894, ready for the official trial trip in accordance with the tenth article of the contract, and that such trial should not, in the interest of the Government, take place until the vessel was fully completed and ready for delivery.

Upon that report the Secretary acted, refusing to give his approval to the proposed trial, and the same was not made.

If the claimant is entitled to recover the expense so incurred in the preparation for the preliminary trial of the vessel, the amount, as verified by the officers of the Navy, and which we find reasonable, was $17,514.94.

XIII.

The items of cost and expense set forth in the several findings herein, both upon the basis of two years' delay and of one year six months and nine days' delay, are as follows:

Finding.	Item.	Two years.	One year 6 months and 9 days.
VIII	Superintendence and unkeep of yard	$72,000.00	$54,887.67
IX	Protection of vessel, cleaning, painting, etc	48,000.00	36,591.78
X	Wharfage of vessel	23,360.00	17,808.00
XI	Insurance on vessel	34,463.55	26,272.55
		177,823.55	135,560.00

41 CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover against the United States the loss and damage sustained by it during the delay of one year six months and nine days, as set forth in Finding XIII, the sum of one hundred and thirty-five thousand five hundred and sixty dollars ($135,560).

PEELLE, Ch. J., delivered the opinion of the court:

The claimant alleges, and the findings show, that through the fault of the officers and agents of the United States, it was delayed two years in the execution of its contract for the construction of the coast-line battle ship "Indiana," by reason of which, notwithstanding a corresponding extension of time was allowed, it suffered great damage; hence this action.

A contract was entered into November 18, 1890, by the terms of which the claimant was, for the consideration of $3,063,000, to construct and complete within three years from that date, in accordance with the specifications made a part of the contract, a seagoing, coast-line battle ship, designated as "No. 1," and subsequently named the "Indiana."

On December 4, 1895, and after the vessel had been completed and delivered, the Secretary of the Navy decided that the cause of the delay for the two years in the completion of the vessel was due to the failure of the United States to furnish the materials which by the terms of the contract they had agreed to furnish, in the order required, to properly carry on the work; and for that reason the claimant was granted a corresponding extension of time for the completion of the vessel.

On May 10, 1894, before the Secretary of the Navy had determined the cause of the delay and before the vessel had been preliminarily accepted, the contract had been modified, as set forth in Finding V, by which the United States had agreed that in consideration of the claimant releasing them "from all and every claim for loss or damage hitherto sustained by reason of any failure" on their part or "on account of any delay hitherto occasioned by" their action, and giving security against any loss on account thereof, they would pay or advance to it the sum of $234,830, said sum being the amount of the reservations of the first twenty-three installments which, under the terms of the original contract, were not payable until after the preliminary acceptance of the vessel.

On June 20, 1894, the installments as agreed upon had been paid to the claimant, who had executed the required release and given security against loss as aforesaid, but no demand for any refund of the sum so paid, or any part thereof, was ever made upon the claimant, nor was any objection or protest made by it to the release so required as a condition of such payment.

Subsequently, May 10, 1896, and in accordance with the sixth paragraph of the nineteenth clause of the contract, the balance of the money due, but which, pending the decision of the Secretary as to the cause of the delay, had been withheld, was paid to the claimant, who, without protest or objection, executed, as required by said paragraph and clause of the contract, a release as follows:

42 "The William Cramp & Sons Ship and Engine Building Company represented by me, Charles H. Cramp, president of said corporation, does hereby, for itself and its successors and assigns and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid."

The vessel as stated was to have been completed within three years from the date of the contract, but was not completed or delivered until two years thereafter, or until November 19, 1895. In view of the penalties provided for in case of delay, as set forth in the ninth clause of the contract, it became important to determine the cause of such delay. That question, as required by the same clause of the contract, was submitted to the Secretary of the Navy, whose decision, as before stated, was that the two years' delay had been caused by the failure of the Government to furnish the materials in the order required as agreed upon. His decision under that clause of the contract, it was provided, "shall be conclusive and binding upon the parties."

The ruling of the Secretary, coupled with the corresponding extension of time for the completion of the vessel, operated to release the claimant

from the penalties otherwise provided for by the contract. But while this is conceded by the defendants, they contend that the Secretary had no authority over the question of the liability of the United States for damages for such delay. That is to say, when the Secretary decided that the delay was caused by the fault of the Government, and for that reason granted the claimant a corresponding extension of time, his authority under the contract was exhausted; that while by the terms of the contract all questions arising thereunder concerning deductions from the contract price of the vessel were to be submitted to the Secretary and his decision thereon was to be "conclusive and binding upon the parties," still he had no jurisdiction to consider or determine whether the cause of delay so decided by him would form the basis of liability for damages against the Government for breach of contract.

On the other hand, the claimant contends that as by the terms of the contract the Secretary was given exclusive jurisdiction to determine the cause of delay, and as he had decided that question in its favor, and thereby released it from the penalties provided for under the contract, the question was res judicata, and being res judicata, was conclusive on the Government in respect of the cause of delay, whether such delay be made the basis for damages for breach of contract or for the release of penalties thereby imposed.

But whether the decision of the Secretary in respect of the cause of delay be conclusive on the Government in this action for breach of contract we need not now decide, as the findings otherwise show that the delay was caused by the Government.

The more important question arising on the facts is as to the effect of the extension of the contract, and in this respect the defendants contend that when the Secretary extended the contract for the period equal to the delay caused by the Government, and thereby relieved the claimant from any penalties, it was thereby granted the full measure of relief contemplated by the contract.

43 That contention is based on the ninth clause of the contract, which, after reciting the various penalities to be imposed in case of the claimant's failure to complete the vessel within the contract time, and of the finality of the decision of the Secretary in respect to the cause of delay, provides:

"All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel."

In support of the contention arising under that provision of the contract the defendants cite the case of Haydnville Mining and Manufacturing Co. v. Art Institute (39 Fed. Rep., 484), which arose in the Circuit Court for the Northern District of Illinois. That was an action to recover a balance claimed to be due for extra work over and above that required by the contract. The contract in that case, among other things, provided that the plaintiff would do all the fireproofing work to be done on the building known as the Art Institute, in the city of Chicago, according to the drawings and specifications; and, further, that

should "delay be caused by other contractors to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architects, provided it shall have given written notice to said architects at the time of such hindrance or delay."

From the case it appears that the plaintiff was one of several contractors doing different portions of work on the same building, and that if he should be delayed in his work by the other contractors, then he should have a "just and proper amount of extra time" within which to complete his work.

In construing that provision of the contract the court said:

"Taking this clause of the contract and the specifications together, I construe them to mean this: That if the plaintiff was delayed by reason of the tardiness or want of dispatch on the part of the contractors doing the other classes of work upon the building, it should be entitled to such further time for the completion of the work as the architects should allow him; but I do not see that there is any provision that it is entitled to pecuniary damages by reason of said delay. Evidently the parties anticipated that this contractor, doing only a part of the work and that which was largely dependent upon the completion of other classes of the work by other contractors, must await the movements of these other contractors; and it seems to me that the stipulation for further time to complete the work in case of delay by other contractors implies that there is to be no pecuniary compensation for such delay."

The evident purpose of that provision of the contract, it seems to us, was to relieve both parties from any liability for delays caused by other contractors. That is to say, the plaintiff was not to be held responsible to the defendant for delays caused by other contractors, nor was the defendant to be held responsible to the plaintiff for such delays, both parties being equally blameless. In other words, as between the parties to the contract there was no breach, and hence no right of action accrued to either.

44 The defendants also cite the case of Richard v. Clark (88 New York Supplement, 242), decided at an appellate term of the Supreme Court of that State in May, 1904. The action arose under a contract to construct a model of the defendant's residence, alleging that damages had been sustained by reason of the delay of the defendant's architect to furnish within the proper time the plans of the building. The contract, among other things, provided that "should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architect, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employee through no fault of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid." * * *

The court, in construing that provision of the contract, said: "Nor am I satisfied that any damages in the case are recoverable either for a delay or for extra work. The claim for delay was necessarily based upon the failure of defendant's architects to furnish the detail plans in time, as to which the contract provided that if the contractor 'be delayed in

the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architects,' etc., 'then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid.' The contract, therefore, explicitly contemplated a situation such as has here arisen, and the intention of the parties as evidenced by the agreement evidently was that the time clause affected plaintiff alone and that he might be absolved therefrom to the extent and in the manner provided in the contract."

In neither of the cases cited did the contract provide for a penalty for delay caused by the contractor; but in the case of Nelson v. Pickwick Associated Company (30 Appellate Court Ill., 333) the contract did provide for a penalty for delay. The provision respecting additional time for such delay was identical with that in the case of the Manufacturing Company v. The Art Institute, supra, and the court held that the granting of additional time for delay caused by other contractors did not preclude the recovery of damages resulting from such delay. The decision was based upon the theory that it was incumbent upon the one who was having the building erected to keep the work in such a state of forwardness as to enable the contractors to complete their respective work within the contract time.

That case differs from the present one in this, that there contracts had been entered into with various contractors to do certain portions of the work on the same building, while in the present case the claimant was the only contractor bound to do work on the vessel, though the Government was to furnish some of the materials therefor.

The claimant could have completed the vessel within the time agreed upon but for the default of the Government; and to hold that the granting of additional time for such default precludes the claimant from the recovery of damages, if otherwise entitled thereto, would, it seems to us, be reading into the contract a provision not in the minds of the parties when the contract was entered into.

45 From the language of the ninth clause of the contract it is evident that what was in the minds of the parties was that if, through the fault of the claimant, the vessel was not completed within the contract time, then the penalties by way of deduction from the contract price might be imposed; but if delayed by the fault of the Government, then additional equivalent time should be allowed, not in lieu of compensation for damages for such delay, but to enable the claimant to proceed to complete the vessel. But for that provision in the contract for additional time, the delay caused by the Government (the claimant having performed its part) would have discharged the claimant from further performance and left it with a right of action for damages on the obligation growing out of the breach. Or the claimant might have continued to perform, reserving to itself the right to sue for such damages as it may have sustained. On the other hand, as the claimant by the terms of the contract agreed that additional time should be allowed, equivalent to such delay, it thereby waived its right to terminate the contract for that cause; but the question of waiving its right to damages growing out of such delay was certainly not in the minds of the parties at the time the contract was entered into.

Nor was the granting of such additional time intended by the parties to operate as an estoppel against the claimant from seeking redress for damages it may have sustained by reason of the default of the Government. Certainty is an essential element in all estoppels, and the rule should not be applied unless the recitals in the contract are clear and conclusive against the claimant. Courts will not suffer a party to be deprived of a right without his consent, and such consent can not be inferred from the mere granting of additional time without any fault on the part of the claimant.

The claimant being without fault in the delay, no penalty could have been imposed upon it without gross error akin to fraud, from which relief would have been granted by the courts. The granting of such additional time was clearly for the benefit of the Government, as it thereby prevented the termination of the contract and saved it the expense of reletting the work to other contractors. Any other construction of the contract, it appears to us, might result in irreparable damage to the claimant, for if the Government is not to be held responsible in damages for its delay by reason of a corresponding extension of time, then it may delay the work indefinitely and exonerate itself by the mere granting of additional time in which to enable a contractor to complete his work.

But this objection, the defendants say, should have been considered by the claimant at the time of entering into the contract, and that if not satisfied therewith it could have declined to so contract. This would be true if the contract clearly so recited, or if the language used was susceptible of no other conclusion. We do not think the language used can be construed to exclude claims for damages arising out of such a breach; and if not, then the extension of time would not operate to deprive the claimant of its right to a recovery therefor.

Nor does the doctrine of expressio unius est exclusio alterius apply. That doctrine is not of universal application, and is always subject to the intention of the parties, evidenced by the contract.

It was not necessary to write into the contract that in case of breach the party injured should be entitled to redress for the damages
46 thereby sustained. That right accrued when the default took place, and it would be no answer to say that because additional time is provided for in the contract therefore no breach occurred, for the extension of time is dependent upon a breach—that is to say, delay caused by the Government in the prosecution of the work.

On this branch of the case, therefore, we reach the conclusion that a corresponding extension of time for the delay caused by the Government was not intended by the parties to conclude the claimant or deprive it of the right to maintain an action for any damages it may have sustained by reason of such delay.

The defendants further contend that the final release set forth in Finding VI was intended by the parties as a full and final discharge of the United States from any and all claims of whatever character growing out of the construction of the vessel under the contract.

That contention is based on the sixth paragraph of clause 19 of the contract, which reads:

"When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party

of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said 'special reserve,' or the surplus, if any, of the said 'reserve fund,' or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

The release which was signed by the claimant May 18, 1896, under that provision of the contract is as follows:

"The William Cramp & Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby, for itself and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid."

In support of their contention the defendants cite the case of Coulter v. Board of Education, etc. (63 N. Y., 365). That case arose under a contract to do the carpenter work on a school building in the city of New York. The contract, among other things, provided in substance that the last payment thereunder should not be made until a certificate had been filed by the contractor to the effect that all claims and demands for extra work or otherwise under or in connection with the contract had been presented to the board of education and the amount to be paid therefor agreed upon, and that such last payment was to be in full of every claim or demand whatsoever in the premises, except the amount agreed upon for extra work.

The contractor was delayed in the prosecution of his work by the contractor doing the mason work. After the expiration of the time and during such delay the price of labor and materials advanced so that the cost of completing the carpenter work was materially increased. For this increased cost the contractor brought suit, but in the certificate which he had previously filed he had omitted to include this item.

47 On the facts stated the court said:

"A material question is, whether the certificate, given by the plaintiff upon receiving the last payment, precludes him from recovering the damages claimed in the complaint. It is quite clear that the certificate alone, regarded as a release or receipt, would not have that effect. It does not in terms release such damages, and the general words employed would, within established principles, be limited to the items specified. (1 Edw. Ch., 34; 1 Cow., 122, and cases there cited.) But the certificate, taken in connection with the contract, presents a different question. * * * By this provision the parties evidently contemplated that all claims arising out of or in consequence of the contract should be presented and liquidated before the final payment was made. If the plaintiff had declined to give the certificate he could not have enforced the payment. By giving the certificate he induced the defendent to make the payment, and is, I think, precluded from afterwards setting up other claims. Under the agreement the certificate amounts to a waiver of other demands. The language of the contract is broad and comprehensive, 'that such

payment is in full of every claim or demand whatever in the premises,' whether for extra work or otherwise. It must be borne in mind that this language was used in advance, and we must give it effect according to the intent of the parties, and it seems most rational to suppose that when the certificate was given and the last payment made, together with the amount of other claims, which had been liquidated, they designed that the transaction should be closed. Parties have a right to make contracts for themselves, and it is the duty of courts to enforce them as made, even though a hardship may be worked. Fraud or mistake may entitle a party to relief, but if neither of these elements exists the contract must be carried out according to its terms. We think the plaintiffs were required to present this claim and make an effort to have it adjusted according to the contract; failing in that, they had the option to bring an action or sign the certificate and waive the claim."

That case is quite different from the present one. There the contractor was required before receiving the last payment to file a certificate setting forth "all his claims and demands for extra work or otherwise under or in connection with the contract," and as he failed to set forth any claim for damages growing out of the increased cost of labor and materials during the period of delay he thereby concluded himself from thereafter asserting such claim.

Here the provision of the contract is that "when all the conditions, covenants, and provisions of this contract shall have been performed or fulfilled" by the contractor, then it "shall be entitled, within ten days after the filing and acceptance of its claim, to receive the 'special reservation,' or the surplus, if any, of the said 'reserve fund,' or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

The final payment was made dependent upon the performance by the claimant of all the conditions, covenants, and provisions of the contract,
and those it had performed, and therefore upon the presentation of
48 its claim therefor it was, under the terms of the contract, entitled
to final payment, upon the execution of a release as therein provided.

But while the form of the release was subject to the approval of the Secretary his act is qualified by the words "of all claims of any kind or description under and by virtue of this contract," and therefore unless the claim for damages growing out of the delay caused by the Government was embraced in the language "all claims of any kind and description under or by virtue of this contract," then such claim was not embraced in the release.

Whatever damages the claimant suffered grew out of the breach by the Government and not by the claimant in its performance and fulfillment of the "conditions, covenants, and provisions" of the contract. The claim, therefore, having arisen out of such breach was not the subject of release contemplated by the contract, nor was it embraced in the final release. The receipt given by plaintiff did not include the release of claims not considered. This question was before the court upon a receipt in almost the exact form arising upon a claim growing out of delays on the part of the Government in supplying material, and the court there

held that it was no bar to the suit. Pneumatic Gun-Carriage Co., 36 C. Cls. R., 71. In our view of the case the question respecting the power and authority of the Secretary of the Navy to settle an unliquidated claim does not arise.

The case of Phelan v. Mayor, etc. (119 N. Y. R., 86, 90), is also cited in support of the defendants' contention. That case arose under a contract for grading a street. The contract in substance provided that the work should be completed in 320 days, and in case of failure so to do the contractor was to pay the wages of inspectors for the excess of time employed in the work. In computing the time the contract provided in substance that the total time during which the work of completing the contract is delayed by the defendants—such time to be determined and certified by the commissioner of public works—should be excluded.

The work not having been completed within the contract time, the defendants retained the inspectors' fee for the extra time. The suit was brought to recover the amount so retained, the contractor claiming that the delay in excess of 320 days was caused by the defendants leaving obstructions in the street. In construing the contract the court, among other things, said: "There was no determination by the commissioner of public works applied for or made under the provision. The inspectors' fees were a proper charge under another provision of the contract, unless, according to the provision quoted, the delay was occasioned by the act or omission of the city. But by the terms of this clause it was a condition precedent to any right of the plaintiff, to be relieved from the allowance of inspectors' fees, that the matter should have been submitted to and determined by the commissioner of public works, and this was not done. It was a lawful provision, and is an answer to the claim in the first count of the complaint. If the commissioner had neglected or refused to act when called upon to do so, a different question would be presented."

The analogy between that and the present case is hardly perceptible. There no determination by the commissioner of public works was applied for or made, and as such determination was made a condition precedent to the contractor's right to be relieved from the expense of
49 inspectors' fees, no recovery could be had therefor. The logical result of that decision is that if the contractor had applied for said determination he would have been allowed to recover.

In the present case the claimant was, when it had performed and fulfilled "all the conditions, covenants, and provisions" of the "contract," entitled "within ten days after the filing and acceptance of its claim, to receive" final payment, upon the execution of a release to the United States "of all claims of any kind or description under or by virtue of this contract."

As no damages grew out of the performance of the contract by the claimant, no claim was predicated thereon; and as the contract does not provide for the release of claims for damages arising out of a breach by the Government, the signing of the final release does not, for the reasons above stated, conclude the claimant from a recovery, if otherwise entitled,

The defendants further contend that by signing the release of May 10. 1894, referred to in Finding V, the claimant thereby concluded itself as to all claims for damages for delay caused by the Government prior thereto. On the other hand, the claimant contends that at the time of

the execution of said release it had been delayed by the Government in the performance of its contract, thereby preventing it from receiving the payments it would have received but for such delay; and further, that the Secretary of the Navy had no authority or jurisdiction to settle the claim for damages growing out of a breach of contract, and that therefore the release respecting the claim for damages was without consideration.

At the time stated the cause of the delay had not been decided by the Secretary, though the time for the completion of the vessel had expired nearly six months before.

The claimant, in order to receive certain payments in advance of the preliminary acceptance of the vessel, entered into the modification of the contract, made a part of the petition, and referred to in Finding V, whereby the contract was modified.

The cost of the vessel was three million and sixty-three thousand dollars ($3,063,000), to be paid in "thirty equal installments, as the work progresses, with the reservation of ten per cent from each payment."

The tenth clause of the contract provides for a preliminary trial trip "to test the hull and fittings, the machinery, including engines, boilers, and appurtenances, the equipment, and the speed of the vessel, and that such vessel shall be accepted only on fulfillment and subject to the conditions and agreements hereinafter set forth." Then follow the conditions, among which is the guarantee by the claimant that the speed "shall be not less than an average of fifteen (15) knots per hour, maintained successfully for four (4) consecutive hours," etc.

The eleventh clause of the contract provides, in substance, that if upon such trial trip the requirements relating to the hull, machinery, and the fitting and securing of her armor shall be fulfilled and the speed of fifteen knots guaranteed as aforesaid shall be developed and maintained, "then and in such case the vessel shall be preliminarily accepted and payment of the last three installments of the contract price of the vessel and of all reservations shall be made, subject, however, to a special reserve of sixty thousand dollars ($60,000) from and out of the reservation hereinafter provided for; but if the speed developed and maintained by said vessel during such trial shall fall below the speed (15 knots) guaranteed as aforesaid she shall be conditionally accepted, subject to deductions, as aforesaid, from the contract price of the vessel on account of her failure to reach the speed (15 knots) guaranteed as aforesaid," provided the conditions relating to the hull, machinery, and fittings of the armor shall have been fulfilled.

In case of such conditional acceptance it is therein provided that the twenty-eighth, twenty-ninth, and thirtieth installments of the contract and the reservation of payments under the contract "shall constitute a reserve fund which shall be applicable to or toward the satisfaction of such deductions from the contract price," to be retained by the Government for that purpose.

The further provision of that clause is that "in case of a preliminary acceptance of the vessel the said special reserve of sixty thousand dollars ($60,000), or in case of a conditional acceptance of said vessel, the said reserve fund, or so much thereof as may, in the judgment of the Secretary of the Navy, be necessary, shall be held until the vessel has been

finally tried after being fully equipped, armed (or weighted correspondingly), and in all respects complete and ready for sea under conditions prescribed or approved by the Secretary of the Navy: Provided, That such final trial shall take place within five months from and after the date of the preliminary or conditional acceptance of the vessel."

Then follow the provisions to the effect that if, upon such final trial, or if not then taken place, any time within five month after the preliminary or conditional acceptance, any weakness or defect in the hull, fitting, or equipment, due to defective workmanship or defective materials, or in the placing and securing of the armor, due to defective workmanship, develops, the same shall, at the expense of the claimant, be corrected and repaired to the satisfaction of the Secretary of the Navy.

At the time of the execution of the modification of the contract, and of the release hereinbefore referred to, the vessel had not been sufficiently advanced to put her upon her trial trip to test her hull, machinery, and speed, and the placing of the armor as aforesaid, and therefore the vessel had not been preliminarily accepted.

We have thus referred at length to the provisions of the contract respecting the trial trip of the vessel to test her hull, machinery, speed, and the placing of her armor, coupled with the condition of the vessel respecting the work then done, in order to get more clearly before us the force and intended effect of the modification or amendment of May 10, 1894, in conformity with which the release referred to was executed.

Under the conditions stated, the contract was modified to the effect that in lieu of the payment of the last three installments and of the amount reserved from the previous payments "only after a trial trip and a preliminary or a conditional acceptance of the vessel," there should be paid to the claimant" so much of the aggregate amount of the last three installments of the contract price and of the amount of the reservations from previous payments as will leave in the hands of the party of the second part an amount sufficient, in the judgment of the Secretary of the Navy, to cover the special reserve of sixty thousand dollars ($60,000) provided for in the eleventh clause of the contract, the cost of all
51 unfinished work and all deductions likely to be made on account of deficiencies in speed and all contingencies that are liable to arise.

"But such payment shall not be made until the party of the first part has given bond with approved security conditioned for the return to the party of the second part of the amount so paid, upon demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part against loss or injury by reason of such payment, and in consideration of such advance payment the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with its contract or on account of any delay hitherto occasioned by the action of said party of the second part."

In conformity with the modification the claimant was paid $234,830, for which it executed the release and gave the required bond. The security exacted was to indemnify the Government against "loss or injury by reason of such payment." That is to say, if upon the trial trip

the speed of the vessel should fall below 15 knots per hour and for that reason be conditionally accepted, deductions were to be made from the contract price of the vessel as provided in the eleventh clause of the contract; and to that end the sum paid was to be restored to the reserve fund and applied to the satisfaction of such deduction.

As before stated, at the time of the modification of the contract and the payment of the money thereunder the question of responsibility for the delay had not been determined nor was such delay at the time conceded to have been caused by the Government, as no extension of time had then been granted by it, and as the vessel had not been preliminarily accepted nor the work thereon sufficiently advanced to determine whether the materials and workmanship were in conformity with the contract, we think the modified contract and the payment of money thereunder was supported by sufficient consideration, and further, that the modification of the contract as made was within the authority of the Secretary of the Navy.

By virtue of the modification the Government parted with the money it might otherwise have kept until the vessel had been preliminarily accepted, and it is no answer to say that but for the delay caused by the Government up to that time the vessel would have been preliminarily accepted or that the materials and workmanship would have been in all respects in conformity with the contract.

The claimant executed the modified contract and the release thereunder required without protest or objection, and by the execution of the bond indemnifying the Government "against loss or injury by reason of such payment" it thereby conceded that the money was not then due, even though the delay up to that time had been caused by the Government.

Again, it is a familiar principle of law that one who accepts the terms of a contract in part must accept the contract as a whole. The claimant accepted the money under the contract before it was in fact due, and in consideration thereof executed the release whereby it released the Government "from all and every claim for loss or damage hitherto sustained by reason of any failure" on the part of the Government "to comply with its contract or on account of any delay hitherto occasioned" by it.

52 It is insisted that the court can give no force or effect to that release, though authorized by the modified contract, because the modification itself was without consideration in this that but for the delay caused by the Government the vessel would have been sufficiently advanced toward completion to entitle the claimant to receive the money it did receive; and that in so far as the modified contract seeks to release the Government from loss or damage caused by such delay, the Secretary of the Navy was acting outside of his powers.

We have endeavored to show that under the circumstances of this case the modified contract was supported by sufficient consideration and that the claimant, having accepted the contract in part, is bound to accept it as a whole.

At that time no claim for loss or damage resulting from delay caused by the Government had been presented to the Secretary of the Navy, nor was any such claim asserted when the modified contract was entered into, hence the provision of the contract requiring a release "from all and

every claim for loss or damage hitherto sustained" by reason of any delay caused by the Government must be treated as a precautionary measure by the Secretary to prevent the claimant from thereafter asserting such claim. Such provisions are common, especially in the modification of contracts where one party seeks to obtain a benefit thereunder in advance of the time specified therefor in the contract, and it would not do to say that such precautionary measures by executive officers are not within their jurisdiction or that such contracts are in their nature the settlement of unliquidated claims.

Clearly the purpose of that provision of the contract was that in consideration of the money paid the claimant would not thereafter assert any claim from which it had released the Government, and this the claimant was bound to know.

Having accepted a part of the contract, the question, therefore, is not whether the Secretary of the Navy had authority to settle such claim, but whether the claimant is not bound to accept the contract as a whole. The recitals therein are clear and particular, and we must hold that the claimant, for the reasons stated, is estopped from now asserting any claim for loss or damage resulting from delay prior to May 10, 1894, though it was subsequently decided by the Secretary of the Navy that the delay for the whole period of two years had been caused by the Government. While we are not free from doubt on this branch of the case because of that decision, still, as the whole matter was within the breast of the claimant and its officers at the time it executed, without protest or objection, the modified contract and release, we are inclined to hold claimant to the contract it entered into and on the faith of which the Government at the time parted with the money.

This brings us to the items of damage caused by the delay. We have found and set out the damage for the two years' delay and then apportioned it for the period subsequent to May 10, 1894; that is to say, we have found the actual or compensatory damages resulting immediately from the acts of the Government. As the claimant was permitted to complete the contract, no question of profits or gains prevented is involved.

Respecting the expense growing out of the purchase of additional ground, as set forth in Finding VII, it is sufficient to say it is not
53 shown that the purchase of the real estate and the improvements thereon were necessary to the construction of the "Indiana," nor that any portion of said outlay was attributable to the vessel. It was incumbent upon the claimant under the contract to provide at its own expense the yard and ground, shops, machinery, tools, and appliances necessary to enable it to perform the contract.

We have, however, in Finding VIII, found the reasonable value of the use of the yard, including said real estate, machinery, tools, superintendence, and general upkeep of the yard equitably chargeable to the "Indiana" during the period of delay, at $3,000 per month, or for the period of delay subsequent to November 10, 1894, at $54,887.67. Similar items were allowed in the case of Myerle (31 C. Cls. R., 105–120), while in the McKay case (27 C. Cls. R., 422) they were disallowed for the reason, stated in the Myerle case (page 137), that "those cases came to this court under special acts containing provisions peculiar to them as to

the measure of damage, whereas this case must be determined by the general rules of law applicable to such cases." So in the present case the damages must be determined by the general rules of applicable law.

In Finding IX we have found the reasonable cost for the care and protection of the vessel during the period of delay, including the cleaning of the bottom, furnishing material and painting (except the last or final coat), electric lighting, keeping up steam to prevent valves from leaking, and every other expense connected therewith for the whole period of delay to be $48,000, and for the period from May 10, 1894, $36,591.78, all of which items of expense we find were reasonable and necessary to the care and protection of the vessel.

Regarding the expense for wharfage set forth in Finding X we are not free from doubt, as the claimant was not a wharfinger, and allowance has been made for the use of the yard, but as the ordinary wharfage at the port of Philadelphia for merchant vessels is found to have been 1 cent per net registered ton during the period of delay, we have, in the absence of any contract, concluded to allow that rate in the present case as reasonable. (Ex parte Easton, 95 U. S. R., 68–73.) The net registered tonnage of the "Indiana," we find, was 3,203.58, and at the rate stated would be $32 a day, or $23,360 for the whole period of delay, and for the period subsequent to May 10, 1894, $17,808, which sum includes the dredging of the basin in which to accommodate the vessel, and also the expense of watchmen; that is to say, wharfage being allowed, the claimant must be regarded as a wharfinger to that extent and therefore chargeable as a bailee for hire with ordinary care. Upon that theory we have made the allowance, in which is included the expense of watchmen.

No allowance is made for the tug service in the removal of the vessel from time to time for the reason that the Government, being charged with continuous wharfage during the period of delay, any removal of the vessel that took place during that period must be held to have been for the benefit of the claimant and not for the benefit of the Government.

Respecting the claim for $34,463.55 for insurance on the vessel during the whole period of delay, or for $26,272.55 for the delay subsequent to May 10, 1894, we find that to have been the reasonable amount paid out by the claimant during that period, and we therefore allow the same.

54 The last item of damage is $17,514.94, for expense incurred in preparing the vessel for her trial trip. This expense has no connection whatever with the delay caused by the Government in failing to furnish the armor.

In March, 1894, the claimant, assuming that the work on the vessel had reached a stage of completion entitling her to a trial trip, so notified the Secretary of the Navy, and that officer called the claimant's attention to the tenth clause of the contract, respecting the payment of the expense therefor by the Government in case such trial should be successful, and, without otherwise approving the proposed trial of the vessel, directed certain naval officers to inquire into such expense and see if the same was reasonable. They verified the same and found no objection to the amount thereof.

The claimant, in proposing the trial trip it did, seems to have acted upon the theory that because other vessels built by it for the United States had been sent on trial trips before their completion, therefore the

"Indiana," with only eight-tenths of her hull and equipment completed and half of the armor fitted, was also subject to such trial trip.

The tenth clause of the contract provides that "when the vessel is completed and ready for delivery to the United States, as required by the drawings, plans, and specifications, she shall be subjected to a trial trip, in the open sea, under conditions prescribed or approved by the Secretary of the Navy, to test the work and fittings, machinery, including engines, boilers, and appurtenances, the equipment and the speed of the vessel, and that such vessel shall be accepted only on fulfillment of, and subject to, the conditions and agreements hereinafter set forth." Then follows the statement of the conditions as to the working of the machinery, the speed developed and maintained, materials and workmanship of the hull, fittings, machinery, etc. And by the eleventh clause of the contract it is provided that if the vessel and her equipment and the fitting of her armor shall meet the requirements, and the speed of 15 knots guaranteed shall be developed and maintained, then and in such case the vessel shall be preliminarily accepted. But manifestly the vessel was not then in condition for such trial trip.

It may be that the claimant suffered loss because the Secretary directed the verification of the expenses incident to the preparation of the vessel for trial, but it was bound to know whether under the contract the vessel was in readiness for such trial trip, and therefore it can not be held that it was misled by the action of the Secretary, even if his act in directing the verification of the expense so incurred should be regarded as giving his tacit assent to such trial.

It is well settled, both by this court and the Supreme Court, that the Government can not be held liable for the promises and acts of its officers and agents unless made and done pursuant to law. Leonard's case (18 C. Cls. R., 382); Allen's case (28 id., 141–146); Whiteside et al. v. United States (93 U. S. R., 247–257), wherein, respecting the rules that should govern in such cases, the court in the last case said:

"Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principles, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the Government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the Government. Story's Agency (6th ed.), sec. 307a; Lee v. Munroe, 7 Cranch, 376."

But we need not rest the case on that theory, for while the act of the Secretary may in fact have been relied upon as his assent to such trial trip, still the claimant can found no right thereon for a recovery in the case, because it was bound to know that under the terms of the contract the offer of the vessel for trial at that time was premature.

The result of our investigation of the whole case is that the laimant is entitled to recover for the loss it sustained by reason of the delay of

the Government to furnish the armor for the period subsequent to May 10, 1894, being for one year six months and nine days, as set forth in Finding XIII, the sum of $135,560.

Barney, J., had not been appointed when this case was tried, and took no part in the decision.

56 V.—*Judgment of the court.*

THE WILLIAM CRAMP AND SONS SHIP AND Engine Building Company *vs.* THE UNITED STATES. } No. 20858.

At a Court of Claims held in the city of Washington on the 29th day of January, 1906, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said The William Cramp and Sons Ship and Engine Building Company have and recover of and from the United States the sum of one hundred and thirty-five thousand five hundred and sixty dollars ($135,560.00).

BY THE COURT.

57 VI.—*Application for and allowance of appeal.*

In the Court of Claims of the United States. Dec. term, 1905.

THE WILLIAM CRAMP AND SONS SHIP AND Engine Building Co. *vs.* THE UNITED STATES. } No. 20858.

From the judgment rendered in the above-entitled cause on the 29th day of January, 1906, in favor of claimant, the defendants, by their Attorney-General, on the 3d day of April, 1906, make application for and give notice of an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
[J. Q. T.] *Assistant Attorney-General.*

Filed April 3, 1906.

Ordered that the appeal in the above-entitled cause be allowed as prayed for.

BY THE COURT.

APRIL 3, 1906.

58 In the Court of Claims.

THE WILLIAM CRAMP AND SONS SHIP AND Engine Building Company *vs.* THE UNITED STATES. } No. 20858.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-

entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 13th day of April, A. D. 1906.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

59 In the Court of Claims. Term 1905–1906.

WILLIAM CRAMP AND SONS SHIP AND Engine Building Company
vs.
THE UNITED STATES. } No. 20858.

From the judgment rendered in the above-entitled cause on the 29th day of January, 1906, the claimants, by their attorney, John C. Fay, on the 16th day of April, 1906, make application for and give notice of appeal to the Supreme Court of the United States.

JOHN C. FAY,
Attorney for Claimant.

Filed in open court April 16, 1906, and it was thereupon ordered

That the appeal be allowed as prayed for, and that the same may be annexed to and form part of the record in said cause as certified to said Supreme Court on the 13th day of April, 1906.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17th day of April, A. D. 1906.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

60 (Indorsement on cover:) File No. 20210. Court of Claims. Term No. 263. The United States, appellant, *vs.* The William Cramp & Sons Ship and Engine Building Company. File No. 20211. Term No. 264. The William Cramp & Sons Ship and Engine Building Company, appellant, *vs.* The United States. Filed April 20, 1906. File Nos. 20210 and 20211.

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